

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-412

OREN F. POTITO,

Petitioner,

and

OREN F. POTITO and HELEN M. POTITO,

Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appeals from the Decisions of the United States Tax Court
and the United States Court of Appeals for the Fifth Circuit
(Florida Case)

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Your Petitioners, Oren Fenton Potito and Helen M. Potito, taxpayers, bring this Petition for Writ of Certiorari to review the judgments of the Tax Court and the judgment affirming the Tax Court decisions by the United States Court of Appeals for the Fifth Circuit, and show:

1. This is an application for a Writ of Certiorari to review decisions of the United States Tax Court in Jacksonville, Florida, Docket Number 5304-68 and 5305-8, being entered August 26, 1975. These cases were consolidated for trial and were reported in Tax Court Memorandum Number 1975-187, filed June 16, 1975. The case was affirmed on appeal by the Fifth Circuit Court of Appeals on June 23, 1976 in Case Number 76-1008.

2. Jurisdiction:

(i) The judgments appealed from were made and entered as shown in paragraph numbered 1.

(ii) Jurisdiction is conferred based on 28 U.S.C.A., Supreme Court Rule 19 (1)(b) where a Court of Appeals is too far departed from the accepted and usual course of judicial proceedings, or so far sanction such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Further jurisdiction is conferred by 28 U.S.C.A., Section 1254(1).

3. Questions for Review:

The following is a list of points in which the Tax Court erred and the Court of Appeals for the Fifth Circuit erred in condoning:

Point No. 1. The Tax Court erred and abused its discretion when it found that Petitioners' testimony was not credible and when it stated that he made numerous evasive statements, misstatements and statements which conflicted with testimony of disinterested witnesses.

Point No. 2. That the Tax Court erred and abused its discretion in finding that the Petitioners did not keep accurate records.

Point No. 3. The Tax Court erred in ruling that Petitioners had not included church income in their tax return.

Point No. 4. The Tax Court erred in its findings that Petitioners lived comfortably during 1963, 1964 and 1965 eating at good restaurants and dressing well, etc. There is no evidence whatsoever to substantiate high living on the part of the Petitioners.

The Tax Court erred in its findings that Petitioners made expenditures substantially exceeding reported disposable income in 1963, 1964 and 1965.

Point No. 5. The Tax Court erred when it found that Petitioners' church was a separate entity from the California organization of the Church of Jesus Christ-Christian.

Point No. 6. The Tax Court was totally in error with regards to income and deductions with regard to the National Christian News (the newspaper). The Tax Court was inconsistent and illogical in its handling of the income and deductions for the newspaper.

The Tax Court erred in its inconsistent findings taxing the Petitioners for income from the church then disallowing legitimate deductions attributable to the income derived from the church. If the church is taxable to Petitioners then Petitioners can take fair and legitimate deductions with regard to the church.

Point No. 7. The Tax Court erred in its findings that Petitioner and Petitioners failed to prove they were entitled to business expenses for the years 1963, 1964 and 1965 in excess of those allowed by the Commissioner.

The Tax Court erred in its treatment of business expenses for all three (3) years.

Point No. 8. The Tax Court erred when it found income to Petitioners with regards to the account of National Engineering Company. The Tax Court erred in its findings that Petitioners had exclusive control of the funds in National Engineering Company and that they were income to them.

Point No. 9. The Tax Court erred when it found that \$1,000.00 from the Whitmans to purchase silver was converted by Petitioners to their own use.

Point No. 10. The Tax Court erred when it found that the boat, motor and trailer was income for personal services rather than a gift.

Point No. 11. The Tax Court erred and was totally inconsistent in its handling of Petitioners' depreciation deductions for the years 1963, 1964 and 1965. The Tax Court erred when it totally disallowed these deductions.

Point No. 12. The Tax Court erred in ruling that Petitioners pay the negligence penalty.

4. Statement of Facts:

1. Petitioners, Oren F. and Helen M. Potito, are husband and wife and reside on Lake George, Florida, and have a mailing address of Box 1739, Ocala, Florida 32670. Petitioners were married in May of 1965. Oren F. Potito resided in St. Petersburg, Florida, prior to his marriage.

2. For the years 1963 and 1964, Petitioner, Oren F. Potito, filed his individual income tax returns; and for 1965, the Potitos filed a joint return.

3. During the years involved in this case, Oren F. Potito was engaged in an electronics repair service business as a sole proprietor under the trade name, Continental Engineering.

4. Oren F. Potito during the period involved was also an ordained Minister of the Church of Jesus Christ-Christian, an organization chartered in California.

5. Oren F. Potito was also the publisher of a monthly newspaper or pamphlet, National Christian News, during the years involved. Oren F. Potito placed funds derived from the publication of the newspaper and certain other endeavors undertaken under the name of Church of Jesus Christ-Christian in a checking account maintained with St. Petersburg Bank and Trust Company of St. Petersburg, Florida.

6. Petitioner during the years involved was preaching at two churches located in St. Petersburg, Florida, one located at 555 Fifth Avenue North and the other on 28th Avenue. These churches were affiliated

with the California Church of Jesus Christ-Christian. Petitioner also acted as President of the Eastern Conference of that church.

7. Both churches in St. Petersburg had an active congregation.

8. Petitioner followed the practice of depositing in the bank account for the Church of Jesus Christ-Christian maintained with St. Petersburg Bank and Trust Company monies of the church derived from subscriptions to the newspaper, contributions and bulk sales of the newspaper. Petitioner made disbursements from the church's bank account in order to pay for the printing of the newspaper, paying the rent for the churches and for the meeting halls and for postage.

9. Petitioner's returns for each of the years involved were prepared by one Geraldine Hall of St. Petersburg, Florida. Mrs. Hall prepared the returns based upon information furnished by Petitioner. Each year Petitioner followed the practice of taking his checks and receipts and tabulating these items and typing them out on a slip of paper under each category, and these sheets were then used by Mrs. Hall in preparing the returns.

10. The Schedule C attached to Petitioner's 1963 return disclosed total business receipts of \$7,320.00.

11. The Schedule C attached to Petitioner's 1964 return disclosed total business receipts of \$8,730.00.

12. The Schedule C attached to Petitioner's 1965 return disclosed gross business receipts of \$7,300.00.

13. The gross receipts shown on the Schedule C for each of the years involved in this case included the gross receipts derived by Petitioner from his electronics service repair business and also his activities as Minister of the Church of Jesus Christ-Christian.

14. The newspaper was published by the Church of Jesus Christ-Christian, and Petitioner acted as editor. The publication was published monthly. The subscription rate for the paper was \$2.00 per year, and copies were sold in bulk units of 100 copies for a sales price of \$3.00. Petitioner first started the paper in October of 1962.

15. In the beginning, the newspaper had approximately 100 subscribers who were confined primarily to the church congregation.

16. Petitioner and one Colonel (Ret.) E. R. Whitman jointly made plans to organize a corporation under the name, National Engineering Corporation.

17. National Engineering was intended to be organized for the purpose of manufacturing and selling an automobile air conditioning system.

18. Sometime prior to planning the organization of National Engineering, Colonel E. R. Whitman and his wife had apparently invested approximately \$13,500.00 with a man by the name of Patrick for the purpose of manufacturing and selling a similar cooler.

The Patrick operation was located in Fort Lauderdale, Florida. Colonel Whitman opened a bank account in the name of National Engineering Corp., with First Park Bank of Pinellas Park, Florida. Checks on this account were drawn on the joint signature of Petitioner, as President, and Colonel E. R. Whitman, as Vice President. Potito was not authorized to sign checks on this account, either individually or singly.

19. Petitioner at no time received any of the funds of National Engineering for his own or personal account.

20. On August 8, 1963, Colonel Whitman drew a check on his account with the Union Trust Company of St. Petersburg, Florida, payable to the order of National Engineering Corporation in the amount of \$20.00, and on August 10, 1963, he drew another check on his account payable to the order of First Park Bank of Pinellas Park, Florida, for \$2,000.00 with a notation thereon that it was for stock in National Engineering Corporation.

21. On October 9, 1963, Colonel E. R. Whitman drew a check on his account with Union Trust Company of St. Petersburg, Florida, payable to Oren Potito's order for \$1,000.00 with a notation thereon that it was given "per agreement".

22. Petitioner utilized the proceeds of this check to purchase 1,000 silver dollars for Colonel Whitman. Petitioner did this as an accommodation to Colonel Whitman. The coins in question were purchased by Potito for Colonel Whitman in Jacksonville, Florida.

Colonel Whitman delivered a Cashier's check to Potito drawn on the First National Bank of St. Petersburg for \$2,000.00 dated July 17, 1961, with a notation thereon "Oren for silver". Potito used the proceeds of the Cashier's check to purchase silver coins for Colonel Whitman. The silver in question was delivered by Potito to Colonel Whitman.

23. Petitioner in filing his 1963 personal tax return on Schedule C thereof claimed a depreciation deduction in the amount of \$1,124.66 for business use of a 1961 Mercedes Benz automobile and miscellaneous office furniture, shop tools and tape recorders.

24. Petitioner claimed depreciation on his 1964 return in the amount of \$1,749.66 which was substantially the same as the prior year, except there was added to the depreciation schedule a 1964 Volks truck.

25. Petitioner in filing his 1964 return claimed a depreciation deduction under Schedule C of \$1,749.66 as he had done in 1964.

26. During each of the years in question, the items of business property as shown on the depreciation schedules were used by Potito in the operation of both Continental Engineering and the operation of the Church of Jesus Christ-Christian, including the publication of the church newspaper. The returns also reflect the costs of each of the items shown on the depreciation schedule.

27. Petitioner in filing his return for 1963 claimed business expense deductions on Schedule C, exclusive

of depreciation, in the amount of \$5,866.00, and the Commissioner disallowed \$2,848.00 of these items, thereby allowing Petitioner business deductions, other than depreciation, for said year of \$3,018.

28. Petitioner in filing his return for 1964 claimed business expense deductions on Schedule C, exclusive of depreciation, in the amount of \$6,162.44, and the Commissioner disallowed \$2,502.45 of these items thereby allowing Petitioner business deductions, other than depreciation, for said year of \$3,659.99.

29. Petitioners in filing their return for 1965 claimed business expense deductions on Schedule C, exclusive of depreciation, in the amount of \$5,848.00 and the Commissioner disallowed \$916.10 of these items, thereby allowing Petitioners business deductions, other than depreciation, for said year of \$4,931.90.

30. On June 18, 1964, Petitioner's residence, 4300 22nd Street North in St. Petersburg, Florida, was burglarized, and Petitioner lost some of his original business records. As a result of the burglary, Petitioner suffered a partial loss of business records for the calendar year 1963 and approximately one-half of 1964. Subsequently, Petitioner went about reconstructing the lost records.

31. Petitioner did not maintain a formal set of personal and business records. Petitioner accounted for his business expenses by retaining cancelled checks and business receipts. At the end of each year, he would separate these items into categories of expenses, such as rent, supplies, and the like. After these

items were tabulated, they were typed on a schedule and the schedules given to Mrs. Geraldine Hall for use in preparing Petitioner's tax return.

32. Petitioner accounted for his business receipts by depositing these monies in the bank and his receipts were tabulated from bank records.

33. During 1964, Petitioner was given a 19-foot Seabreeze outboard boat, together with an 80 horsepower West Bend motor. The boat and motor were given to Petitioner by a Mr. and Mrs. Ernest Stevens who resided at 804 4th Avenue North, St. Petersburg, Florida. The Stevens were members of Petitioner's church. Petitioner was not related to the Stevens, nor had he rendered any service to them that called for compensation as such during 1964 or any year prior thereto.

34. At the trial, Petitioner produced a schedule, together with various and sundry supporting vouchers, such as checks, receipts, invoices and the like that his ordinary business expenses and medical expenses for the years involved were:

Items	1963	1964	1965
Repairs	\$ 606.86	\$ 882.05	\$ 31.42
Rent	803.00	1,574.16	1,650.00
Telephone	235.30	116.40	553.06
Labor	178.05	—	250.68
Supplies	1,195.32	1,750.99	2,363.27
Printing	855.96	1,279.03	1,178.67
Travel	294.92	48.85	90.42
Medical	44.00	837.00	213.25
Postage	—	78.84	352.59
Licenses	—	113.96	—
Totals	\$4,213.41	\$6,681.28	\$6,683.36

35. During the years involved, Petitioner used the Mercedes Benz shown on his depreciation schedule in connection with his church activities, as well as providing a means of transportation in his electronics service work. The other depreciable assets, other than the tape recorders, shown on the depreciation schedules were used primarily in the operation of Continental Engineering.

36. The tape recorders shown on the depreciation schedule were used primarily for church work and were also partially used in connection with the business affairs of Continental Engineering. Petitioner purchased the Mercedes Benz June 19, 1962, at a cost of \$6,673.00. The Volkswagen truck which Petitioner acquired in 1964 was used primarily in making deliveries and pickup of equipment in connection with the affairs of Continental Engineering, although the Volkswagen was occasionally used in church work, such as delivering papers. Petitioner purchased the Volkswagen for a total cost of \$2,874.90, but for some reason, it was carried on the depreciation schedule at a cost of \$2,500.00.

5. Argument:

There are three tax years involved in this case. The first two years the Petitioner, Oren Fenton Potito, was a single man and the third he was married to the Petitioner, Helen M. Potito. The third year the parties filed a joint return; however, all income was generated by the Petitioner, Oren Fenton Potito. For purposes of this Petition, "Petitioner" will be Oren Fenton Potito.

The real reason that this case was brought by the Commissioner of Internal Revenue to begin with was coercion and suppression of the Petitioner for his religious and political beliefs.

Petitioner believes that the true Biblical Israelites were the Anglo-Saxon race. For this reason, many people would consider the Petitioner to be anti-Semitic. The Petitioner also holds views that the Federal Reserve and the Internal Revenue Code are unconstitutional and illegal acts. Petitioner has preached extensively concerning his political views and has also published newspapers concerning his religious and political views. For this reason, persons within the Internal Revenue Service have decided to persecute the Petitioner.

It will show, from an examination of the record, that a case of this nature should have been settled many years ago by either an agent of the Internal Revenue Service or an Appellate Conferee. No settlement was ever offered because no settlement was desired by the Internal Revenue Service since this would end the persecution. From examining the record, the Court will find it very strange that a case of such a small nature would be pressed to such an extent as it was pressed by the Internal Revenue Service. Petitioner is bringing this Petition for Writ of Certiorari to show that he will not be oppressed and persecuted by the Internal Revenue Service due to his constitutionally guaranteed political and religious rights without putting up a substantial fight.

The Court is requested to read very closely the Memorandum Findings of Fact and Opinion entered

by the Tax Court in this cause which is appended to this Petition. Petitioner feels that from a reading of this Opinion it will appear that something is not altogether correct and proper.

The Trial Judge found on page 4 of the Memorandum Findings of Fact and Opinion that Petitioner was the sole proprietor of Continental Engineering which had no permanent employees. This company derived its income from servicing television sets and air conditioners owned by various motels located on beaches in the vicinity of St. Petersburg, Florida. Then on pages 8 and 9, the Trial Judge found that the Petitioner was a Minister of a Church, which he later found was income generating to the Petitioner. On page 10 of the Memorandum Findings of Fact and Opinion, the Trial Judge found that Petitioner was Editor and Distributor of the National Christian News (the newspaper), also considered by the Trial Court to be an income producing activity. After finding that Petitioner was engaged in three income producing activities, basically handled strictly by himself as a sole proprietor, the Tax Court Judge proceeded to totally deny Petitioner's claim for depreciation on any of his automobiles or assets involved in any of these businesses. The Court will note on page 17 of the Memorandum Findings of Fact and Opinion that Petitioner was only claiming as depreciation \$1,124.66 in 1963 and a total of \$1,749.66 in 1964 and 1965. It staggers the imagination that a person could be in a business as a sole proprietor with no permanent employees that serviced television sets and air conditioners in motels on St. Petersburg Beach and not be allowed depreciation for his automobile or any of his shop tools. When you add to this surprising

situation the fact that Petitioner was a Minister and a Newspaper Editor and Publisher, you wonder how he got around to all the churches, motels, and distributing points for the paper without an automobile. You also wonder how he could manage to make any repairs without some sort of tools.

On page 5 of the Memorandum Finding of Facts and Opinion the Trial Judge found that Petitioner used the Mercedes Benz for Continental Engineering service calls, personal transportation and speaking engagements. This established the use of the vehicle. The Trial Judge pointed out that the price of the vehicle was established. Mrs. Whitman, one of the "disinterested witnesses", as labelled wrongly by the Trial Judge, testified to buying the Mercedes Benz from Petitioner in 1965 for \$2,300.00. Therefore, the original price, salvage value, length of time used, and use was shown. It still is surprising that no depreciation was allowed.

An examination of the record, including transcript and exhibits, in the Tax Court will show that the political and religious views of the Petitioner were very much apparent to the Trial Judge. On page 8 of the Memorandum Findings of Fact and Opinion the Trial Judge pointed out that Petitioner's Church was not recognized by the St. Petersburg Council of Churches. This point was injected into the record by Counsel for the Commissioner of Internal Revenue along with all of the other religious and political views of the Petitioner. On page 9 of the same Memorandum the Trial Judge pointed out, "The followers of the Church believe that the real Biblical Israelites were the Anglo-Saxon race".

One of the items of income attributed to the Petitioner is a \$2,500.00 boat, motor and trailer given to the Petitioner by Mr. and Mrs. Ernest Stevens, members of Petitioner's church. The Commissioner of Internal Revenue decided that this boat was income to the Petitioner paid to him for services as a Minister. The Petitioner maintains that this boat, motor and trailer was a love gift and not compensation. I would like to point out that if Petitioner had been a Baptist, Catholic, Presbyterian, Methodist, Lutheran, or one of the other more established churches, this gift would not have been questioned by the Internal Revenue Service in any way shape or form. There was no testimony by anyone at the trial that this boat, motor and trailer was not a gift to the Petitioner. The Trial Judge accepted Petitioner's testimony concerning the value of the boat and everything else concerning the boat except for the fact that it was a gift. It is submitted that Petitioner just simply was not a member of the proper Church to satisfy the Internal Revenue Service.

The Trial Judge attempted to construct income on the part of Petitioner in his capacity as Editor and Publisher of the National Christian News. In order to construct income, the Trial Judge took the Petitioner's deduction for mailing, which was uncontrovertedly done by first class mail, and arbitrarily and capriciously ruled on page 10 of the Opinion that the Newspaper was partially distributed through the mails at bulk rates. By using the bulk rate mailing to determine subscribers, the Trial Judge came out with totally ridiculous numbers of paying subscribers for 1963, 1964 and 1965 as 1,291, 1,368 and 2,141 subscribers, respectively. Petitioner did not have a bulk

rate mailing permit and no one testified to the fact that he did have a bulk rate mailing permit. This was just another arbitrary and capricious act on the part of the Commissioner of Internal Revenue and the Trial Court Judge. If the Petitioner had the number of subscribers found by the Judge, his deduction should be increased to the first class rate for that number of subscribers. There should be some consistency in the Commissioner's and the Trial Judge's madness.

In order to successfully impale the Petitioner both at the trial level and on the appellate level, the Trial Judge, in the Opinion section of the Memorandum on page 18, found that Petitioner relies heavily upon his own testimony which lacks credibility because of numerous evasive statements, misstatements and statements which conflict with testimony of disinterested witnesses. If the Court grants this Petition for Writ of Certiorari, it will examine the testimony and see that this statement by the Trial Judge simply is not true. There were six witnesses who testified. They were as follows:

1. Oren Fenton Potito, Petitioner.
2. Leona Elsenheimer, the Newspaper Printer's employee.
3. Horace Edward Bonner, the Appellate Conferee.
4. John J. Brown, a postal employee.
5. Geraldine Hall, Petitioner's Income Tax preparer, and
6. Helen E. Whitman, one of Petitioner's parishioners.

The Petitioner testified concerning all the matters and most of all the pertinent facts in the Opinions were based upon his testimony. The second witness, Leona Elsenheimer, was a printer's employee who did not go to work for the printer until November 1965, one month before the end of the last taxable year in question. Mrs. Elsenheimer's only testimony was concerning the number of papers that the printer printed for Petitioner. This number was approximately 5,000 every month. This is totally consistent with Petitioner's testimony. There was no question as to how many were printed only how many were sold. The third witness, Horace Edward Bonner, was the Appellate Conferee, who, the record will show, gave no testimony at all that was not either stricken by the Court or withdrawn by the Commissioner of Internal Revenue. The fourth witness was John J. Brown, a postal employee in Jacksonville who testified concerning postal rates in 1963, 1964, and 1965. Mr. Brown was not involved in the mailing of the newspaper. He was there strictly to establish postal rates. Mr. Brown did not establish that Petitioner had a bulk rate permit. He only testified as to what rates were during those times. The fifth witness was Mrs. Geraldine Hall, the Income Tax Preparer for Petitioner. Mrs. Hall really gave no inconsistent testimony since she testified that she transferred everything from a worksheet prepared by Petitioner to his returns. She had nothing to do with his receipts or cancelled checks.

The only other witness involved was a Mrs. Whitman. A reading of her testimony will show that (a) she was not a disinterested witness, (b) she stated on

cross-examination that she really did not know that much about the dealings that she had testified to since her husband handled all of that. She testified to having had cancer during the years testified to by her and that she was more concerned with that than anything else. The Appellate Court reluctantly had to state that her testimony was not a "model of clarity". A reading of the testimony will show that she was

- (1) not really in a position to testify from her own personal knowledge, and
- (2) was senile and addled.

There just was not any testimony by any disinterested witnesses that conflicted in any way with Petitioner's testimony.

To further point out total inconsistencies in the Trial Judge's thinking, I direct the Court's attention to page 5 where the Trial Judge found "the printing expense deducted each year was an expense of Continental Engineering and not the church". This is totally ridiculous in that the printer's employee that testified stated that all printing was paid for by the Church of Jesus Christ-Christian on their checks. She stated that the printing was of the Church Newspaper and nothing else. How could it be a Continental Engineering expense?

Petitioner was very dissatisfied with his attorney at the Trial Court level. Petitioner feels that he did not receive a fair hearing at the Trial Court level due to the action of his attorney. The attorney, at one point in the transcript, was told by the Trial Judge that he should

seek a continuance. The attorney failed to do so. The attorney also failed to subpoena the parishioners who gave the Petitioner his boat, motor and trailer. The attorney told Petitioner that the only witness necessary for the trial was Petitioner.

Respectfully submitted,

CHARLES R. ROWE
225 North East 8th Avenue
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APPENDIX

[1] T. C. Memo, 1975-187

UNITED STATES TAX COURT

OREN F. POTITO, Petitioner v. COMMISSIONER OF
INTERNAL REVENUE, Respondent

OREN F. POTITO and HELEN M. POTITO, Petitioners
v. COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 5304-68,
5305-68.

Filed June 16, 1975.

William R. Frazier, for the petitioners.

Robert J. Shilliday, Jr., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

GOFFE, Judge: The Commissioner determined deficiencies in petitioners' Federal income tax and additions to tax as follows:

[2]

Petitioner	Docket No.	Taxable Year	Income Tax Deficiency	Addition to Tax Sec. 6653(a) I.R.C. 1954
Oren F. Potito	5304-68	1963	\$2,156.18	\$107.81
Oren F. Potito	5304-68	1964	2,170.19	108.51
Oren F. Potito & Helen M. Potito	5305-68	1965	574.03	28.70

The cases were consolidated for trial, briefs and opinion. The following issues are presented for decision:

1. Whether petitioners omitted from their taxable income for the years 1963, 1964 and 1965, \$1,100.68, \$2,702.65, and \$1,632.40, respectively, deposited in a checking account maintained by the Church of Jesus Christ-Christian and derived from amounts received for publication and distribution of the National Christian News newspaper and from donations by those attending church meetings;

2. Whether petitioner is taxable in the year 1963 on \$2,920 in deposits made to a checking account maintained in the name of National Engineering Company;

3. Whether petitioner is taxable on \$1,000 allegedly received for the purchase of silver in the taxable year 1963;

4. Whether a boat, motor and trailer received by petitioner in 1964 are income to him in that year at a value of \$2,500;

[3] 5. Whether petitioners are entitled to part or all of the business expenses disallowed for the years 1963, 1964 and 1965 in the amount of \$2,848.08, \$2,502.45 and \$916.10, respectively;

6. Whether petitioners are entitled to depreciation deductions of \$1,124.66, \$1,749.66 and \$1,749.66 claimed on Federal income tax returns for the years 1963, 1964 and 1965, respectively; and

7. Whether petitioners are liable for the 5 percent negligence penalty prescribed by section 6653(a), Internal Revenue Code of 1954¹ for each of the years in issue.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts and attached exhibits are incorporated by this reference.

At the time the petitions were filed, Oren F. Potito (hereinafter referred to as petitioner) and Helen M. Potito were husband and wife and resided in Ocala, Florida. Prior to his marriage to Helen in 1965, petitioner resided in St. Petersburg, Florida. [4] Petitioner filed individual income tax returns for 1963 and 1964, and petitioners filed a joint return for 1965, all with the District Director of Internal Revenue, Jacksonville, Florida.

Petitioner was the sole proprietor of Continental Engineering which had no permanent employees. Continental Engineering derived its income from servicing television sets and air conditioners owned by various motels located on beaches in the vicinity of St. Petersburg, Florida. Continental Engineering received a minor portion of its gross receipts from the sale, installation, and servicing of air conditioners, television sets, refrigerators, electronic equipment and appliances.

¹ All statutory references are to sections of the Internal Revenue Code of 1954 in effect during the taxable years in issue, unless otherwise noted.

Deposits to Continental Engineering's bank account at the St. Petersburg Bank & Trust Company were as follows:

1963	1964	1965
\$943.00	\$1,917.00	\$3,742.23

Petitioner did not deposit all of Continental Engineering's gross receipts in its bank account. His only record of Continental Engineering's gross receipts was the Continental Engineering bank account statements. Petitioner did not keep accurate records of his income as it was received.

[5] On his 1963, 1964 and 1965 income tax returns, petitioner reported gross receipts from Continental Engineering business of \$7,320 for 1963, \$8,730 for 1964, and \$7,300 for 1965. The business deductions which petitioner itemized on his 1963, 1964 and 1965 income tax returns were attributable to Continental Engineering and not any other enterprise. The printing expense deducted each year was an expense of Continental Engineering and not the church. The depreciation deductions taken by petitioner on his 1963, 1964 and 1965 income tax returns were based on costs and useful lives of various business assets used in his Continental Engineering business. The Mercedes Benz automobile which was reported as a depreciable asset in each year was used for Continental Engineering service calls, personal transportation, and occasionally for speaking engagements.

Petitioners' income tax returns for the taxable years 1963, 1964 and 1965 were prepared from written sum-

maries of their records which were provided the return preparer in each of those years. The information contained in the written summaries was properly transferred to the returns by the return preparer. [6] The gross receipts which petitioner entered on these written summaries were solely Continental Engineering gross receipts. The return preparer described the gross receipts as Continental Engineering gross receipts because petitioner had told her that his only source of income was from Continental Engineering. Petitioners' income tax returns for 1963, 1964 and 1965 do not report any income from church or other income-producing activities. Petitioners' gross receipts from Continental Engineering in 1963, 1964 and 1965 were \$7,320, \$8,730 and \$7,300, respectively.

Petitioner reported a net profit of \$328.74 and \$817.90 on his 1963 and 1964 income tax returns, and petitioners reported a loss of \$297.66 on their 1965 return. On their income tax returns for the taxable years 1963, 1964 and 1965, petitioners claimed depreciation deductions of \$1,124.66, \$1,749.66 and \$1,749.66, respectively. Petitioners did not pay any Federal income taxes for the taxable years 1963, 1964 and 1965. Petitioner, however, paid \$44.17 in self-employment tax for the taxable year 1964. Petitioner reported that his disposable income (depreciation plus net profit minus taxes paid) in 1963, 1964 and 1965 was \$1,453.40, \$2,523.39 and \$1,452, respectively.

[7] On his income tax return for the taxable year 1964, petitioner claimed to have incurred \$910 in doctor, hospital, dentist and drug expenses; \$120 in interest on automobile loan; and \$76 in taxes. Petitioner's dis-

posable income remaining after these expenses for 1964 was \$1,417.39.

Petitioners incurred and paid medical expenses of \$44 in 1963 and \$213.25 in 1965. Petitioner purchased a Mercedes Benz automobile in 1962 for \$6,700. Petitioner financed \$6,500 of this amount at a bank but the terms of payment are unknown.

In 1963, petitioner purchased a microfilm camera and viewer for \$275, a vacuum cleaner for \$249.50, a tape recorder for \$395, tear gas pens for \$60, and several groups of books for \$355.06. In addition, petitioner purchased a 1964 Volkswagen bus in 1963 for \$2,500. The record does not disclose the terms of payment. Petitioner purchased a 1963 red Chrysler convertible in 1963 for an undisclosed amount.

Petitioner paid \$101 for a patent, \$280 for a linotype machine, \$100 for a generator, \$95 for a press and \$132.82 for radios in 1964.

In 1965, petitioners paid \$113.25 for radio equipment, \$577.48 for furniture, \$55.62 for a boat top and \$35 for his wedding. Petitioner leased a home in Ocala, Florida, in 1965 paying \$100 per month for six months as rent for his personal living quarters.

Petitioner lived comfortably during 1963, 1964 and 1965 eating at good restaurants and dressing well, etc. In 1963, 1964 and 1965, petitioner expended a substantial amount of funds on personal living expenses including mower repairs, veterinary expenses, books and magazines, insurance, utilities, garbage collec-

tion, furniture, jeep repairs, repairs on other personal items, food, clothing, restaurant bills, and other miscellaneous living expenses.

Petitioners' expenditures substantially exceeded reported disposable income in 1963, 1964 and 1965. Petitioners received income in taxable years 1963, 1964 and 1965 which was not reported on their income tax returns.

After petitioner was designated a minister by the president of the Church of Jesus Christ-Christian (church), an organization chartered in California, he was allowed to establish his own church in St. Petersburg, Florida. Petitioner's church was a separate entity from the California organization. It was not recognized by the St. Petersburg Council of Churches.

[9] A minister of the church was required to have knowledge of the Bible and fully understand church doctrine. The followers of the church believed that the real biblical Israelites were the Anglo-Saxon race.

During the years in issue, petitioner spoke at several churches and other establishments which were rented by his church. Petitioner held three meetings per week for the members of his church with attendance at each meeting varying from 15 to 550 people.

Petitioner received income from his church members in the form of cash payments, food, clothes and reimbursement of his expenses. Petitioner exercised exclusive control over all cash receipts. He did not for-

mally designate a portion of the cash receipts as salary, but spent the money on himself, for church or other activities at his sole discretion. Petitioner had no records of cash receipts from church members other than the bank statements of the church account at the St. Petersburg Bank & Trust Company, St. Petersburg, Florida. The deposits into the church account totaled \$1,100.68 in 1963; \$2,702.65 in 1964; and \$1,632.40 in 1965. Petitioner had sole authority to withdraw funds from this bank account.

[10] Petitioner was publisher, editor and distributor of the National Christian News (the newspaper) which was a church-related, income-producing activity. During the years in issue, petitioner normally had 5,000 copies of the newspaper printed each month and paid for the printing by drawing checks on the church account.

The yearly subscription cost for a single copy of the newspaper was \$2 in 1963, 1964 and 1965. The newspaper could also be purchased in 100 paper lots for \$3 for distribution aimed at increasing circulation. Some of the funds deposited in the church account were derived from news subscriptions. Petitioner had no records of receipts from newspaper sales other than the church bank statements.

The newspaper was partially distributed through the mails at bulk rates. The postal bulk rate was 2-5/8 cents in 1963; 2-3/4 cents in 1964; and 2-7/8 cents in 1965. Expenditures for postage stamps were as follows:

1963 —	\$406.73
1964 —	738.73
1965 —	451.58

The average number of subscribers to the newspaper in 1963, 1964 and 1965 was 1,291, 1,368 and 2,141, respectively. Petitioners' income from the newspaper [11] subscriptions in 1963, 1964 and 1965 was \$2,582, \$2,736 and \$4,282, respectively.

Petitioner omitted from his income tax returns for taxable years 1963, 1964 and 1965 at least \$1,100.68, \$2,702.65 and \$1,632.40, respectively, which were the funds deposited in the church bank account.

In response to representations that he could develop a workable automobile cooler which would revolutionize automobile air conditioning and yield huge profits, in 1963 a Mr. and Mrs. Whitman placed \$2,920 at petitioner's disposal in a bank account in the First Park Bank, Pinellas Park, Florida. Petitioner was to organize a corporation called National Engineering as the business vehicle through which the coolers would be developed, manufactured and marketed. The corporation was never organized. Although these funds were to be used in developing the cooler, petitioner was secretive about expenditures from the account resulting in the Whitmans' decision to close the account in 1964 or 1965 and withdraw the \$1,300 balance which remained. One thousand six hundred and twenty dollars of the \$2,920 made available to develop the cooler was unaccounted for and is taxable to petitioner in 1963.

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[12] In May 1963, petitioner received \$1,000 from the Whitmans to purchase silver for the Whitmans who never received the silver. The \$1,000 which petitioner received from the Whitmans in 1963 for silver constitutes taxable income to him in 1963.

Petitioner received a new 19-foot Seabreeze boat, 80-horsepower Westbend motor and boat trailer in 1964 from Mr. and Mrs. Ernest Stevens in payment for his services as their minister which petitioner did not include in his income for 1964. The boat, motor and trailer are includible in petitioner's taxable income in the year 1964 at a value of \$2,500.

For the taxable year 1963, the Commissioner allowed petitioner the following business expenses:

Rent	\$ 375.00
Telephone	180.15
Repairs	110.25
Transportation	137.45
Travel	110.00
Storage and Equipment	
Rental	16.20
Parts and Equipment	
for Resale	379.62
Advertising	56.50
Labor	205.00
Post Office Box Rent	9.00
Postage	406.73
Printing and Supplies	916.76
Subscriptions	8.00
Other	107.86
TOTAL	<u>\$3,018.52</u>

On his 1963 income tax return, petitioner claimed the following business expenses:

11a

[13]

Materials and Supplies	\$1,944.00	
Depreciation	1,124.66	
Other Expenses:		
Phone	\$1,240.00	
Licenses	65.00	
Gas & Oil	603.00	
Insurance	90.00	
Office Expense	600.00	
Printing	50.00	
Dues	13.00	
Entertainment & Promotion	52.00	
Car Repairs	416.10	
Tax Return Expense	20.00	
Tolls	100.00	
Travel Expense	500.00	
Tool Rental	25.00	
Laundry & Uniforms	114.00	
Auto & Trailer	34.50	3,922.60
TOTAL		<u>\$6,991.26</u>

At trial, petitioner contended that his business records proved he was entitled to the following business expenses for 1963:

Rent	\$ 803.00
Repairs	606.86
Telephone	235.30
Labor	178.05
Supplies	1,195.32
Printing	855.96
Travel	294.92
TOTAL	<u>\$4,169.41</u>

12a

Petitioner failed to show he was entitled to business expenses for the taxable year 1963 in excess of those allowed by the Commissioner.

[14] For taxable year 1964, the Commissioner allowed petitioner the following business expenses:

Rent	\$ 250.00
Telephone	240.11
Repairs	143.77
Transportation	236.96
Storage and Equipment	
Rental	49.55
Parts and Equipment	
for Resale	284.33
Advertising	95.08
Labor	148.00
Post Office Box Rent	18.00
Postage	738.73
Printing and Supplies	1,177.49
Travel	122.31
Other	155.66
TOTAL	<u>\$3,659.99</u>

On his 1964 income tax return, petitioner claimed the following business expenses:

Cost of Goods Sold	\$2,010.00
Depreciation	1,749.66
Repairs & Maintenance	530.00
Insurance	110.00
Tax Return Preparation	20.00
Interest	172.44
Other Expenses:	
Telephone	\$1,380.00
Licenses	80.00

13a

Gas & Oil	640.00	
Printing	60.00	
Tolls	100.00	
Travel Expenses	800.00	
Laundry & Uniforms	150.00	
Auto Tags	45.00	
Entertainment & Promotion	52.00	
Dues	13.00	3,320.00
TOTAL		<u>\$7,912.10</u>

[15] Petitioner contended at trial that his business records proved he was entitled to the following business expenses for 1964:

Printing	\$1,279.03
Telephone	116.40
Travel	48.85
Postage	78.84
Licenses	113.96
Supplies	1,750.99
Repairs	882.05
Rent	1,574.16
TOTAL	<u>\$5,844.28</u>

Petitioner failed to prove he was entitled to business expenses for the taxable year 1964 in excess of those allowed by the Commissioner.

14a

For taxable year 1965, the Commissioner allowed petitioners the following business expenses:

Rent	\$1,325.00
Telephone & Telegraph	307.30
Repairs	166.22
Transportation	204.43
Travel	215.00
Storage & Equipment Rental	67.95
Parts and Equipment for Resales ..	744.67
Advertising	128.03
Dues	5.00
Labor	103.25
Taxes and Licenses	113.55
Post Office Box Rent	3.00
Postage	451.58
Printing & Supplies	1,069.85
Subscriptions	3.00
Other	<u>24.07</u>
TOTAL	<u>\$4,931.90</u>

On their 1965 income tax return, petitioners claimed the following business expenses:

[16]

Cost of Goods Sold	\$2,300.00
Depreciation	1,749.66
Rent	200.00
Tax Return Preparation	20.00
Other Expenses:	
Phone	\$ 740.00
Gas & Oil	550.00
Printing	80.00

15a

Tolls	50.00	
Travel Expense	1,500.00	
Laundry & Uniforms	100.00	
Auto Tags	45.00	
Entertainment & Promotion	250.00	
Dues	<u>13.00</u>	<u>3,328.00</u>
Total		<u>\$7,597.66</u>

Petitioners contended at trial that their business records proved they were entitled to the following business expenses for 1965:

Supplies	\$2,363.27
Travel	90.42
Telephone	553.06
Postage	352.59
Repairs	31.42
Labor	250.68
Rent	1,650.00
Printing	<u>1,178.67</u>
TOTAL	<u>\$6,470.11</u>

Petitioners failed to show they were entitled to business expenses for the taxable year 1965 in excess of those allowed by the Commissioner.

The expenses allowed in the statutory notices adequately recognized the expenses petitioners were able to prove. Petitioners understated the taxable income shown on the 1963, 1964 and 1965 income tax returns by overstating business expenses as follows:

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[17]

	1963	1964	1965
Expenses claimed			
less depreciation	\$5,866.60	\$6,162.44	\$5,848.00
Expenses allowed	<u>3,018.52</u>	<u>3,659.99</u>	<u>4,931.90</u>
Increase in Income	<u>\$2,848.08</u>	<u>\$2,502.45</u>	<u>\$ 916.10</u>

The description of each of petitioners' depreciation deductions (based on the straight line method of computing depreciation) contained in the returns for the taxable years 1963, 1964 and 1965 is as follows:

Asset	Cost	1963		
		Year Acquired	Useful Life	Depreciation Deduction
1961 Mercedes Benz	\$5,387.40	1962	4	\$1,096.85
Less: 10% personal				<u>109.69</u>
				\$ 987.16
Office Furniture	125.00	1957	10	12.50
Office Furniture & Equipment	193.00	1959	10	19.30
Shop Tools	162.00	1961	10	16.20
Tape Recorders (2)	500.00	1962	10	50.00
Tape Recorder	395.00	1963	10	<u>39.50</u>
TOTAL				<u>\$1,124.66</u>

Asset	Cost	1964 and 1965		
		Year Acquired	Useful Life	Depreciation Deduction
1961 Mercedes Benz	\$5,387.40*	1962	4	\$1,096.85
Less: 10% personal				<u>109.69</u>
				\$ 987.16
Office Furniture	125.00	1957	10	12.50
Office Furniture & Equipment	193.00	1959	10	19.30
Shop Tools	162.00	1961	10	16.20
Tape Recorders (2)	500.00	1962	10	50.00
Tape Recorder	395.00	1963	10	<u>39.50</u>
1964 Volks Truck	2,500.00	1963	4	<u>625.00</u>
TOTAL				<u>\$1,749.66</u>

* \$374.00 Salvage Value deducted

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Petitioner purchased a 1961 Mercedes Benz 300 automobile on June 29, 1962, for a total purchase price of \$6,700. [18] Petitioners are not entitled to any depreciation deduction for the taxable years 1963, 1964 and 1965.

Petitioners' records are disorganized, incomprehensible, and do not support their income tax returns for taxable years 1963, 1964 and 1965. Petitioners' omissions of income from the returns for the taxable years 1963, 1964 and 1965 and overstatement of expenses on the returns for the taxable years 1963, 1964 and 1965 were due to negligence or intentional disregard of rules and regulations. The 5 percent negligence penalty is applicable to petitioners' underpayments of tax for taxable years 1963, 1964 and 1965.

OPINION

The issues are factual and petitioners must prove the Commissioner's determination erroneous. Rule 142, Tax Court Rules of Practice and Procedure. Petitioner, Oren F. Potito, relies heavily upon his own testimony which lacks credibility because of numerous evasive statements, misstatements and statements which conflict with testimony of disinterested witnesses. Accordingly, except as noted below, we sustain the Commissioner's determination. See *Stein v. Commissioner*, 322 F.2d 78 (5th Cir. 1963), affg. a Memorandum Opinion of this Court.

[19] Issue 1. Deposits to the Account of the Church

The Commissioner determined that petitioners omitted from taxable income for the years 1963, 1964

and 1965 the sums of \$1,100.68, \$2,702.65 and \$1,632.40, respectively, deposited in a checking account maintained by the Church of Jesus Christ-Christian. Conceding that the deposits were includible in income, petitioner contends that such deposits were included in gross receipts reported in each of the years in issue and that if sustained, the Commissioner's determination would result in taxing this income twice.

After examining petitioners' returns and listening to the testimony of the return preparer, we are convinced that during each of the years in question, the income reported was derived solely from Continental Engineering and no other source. And, since petitioner failed to adequately explain expenditures greatly in excess of reported income, we are satisfied that he received unreported income taxable in the years 1963, 1964 and 1965. Accordingly, we hold for respondent on this issue.

[20] *Issue 2. \$2,920 Deposited to
the Account of National Engineering Co.*

In response to representations that he could develop an automobile air conditioner which would yield huge profits, Mr. and Mrs. Whitman, in 1963, placed \$2,920 at petitioner's disposal in a checking account at a local bank. Petitioner was to organize a corporation called National Engineering to develop, manufacture, and market the air conditioner. The corporation was never organized and, therefore, the Whitmans never received any National Engineering stock. Although the funds were to be used in developing the air condi-

tioner, petitioner was secretive about expenditures from the account resulting in the Whitmans' decision to close the account in 1964 or 1965 and withdraw the \$1,300 balance which remained. The Commissioner determined that the entire \$2,920 deposited for National Engineering constituted income to petitioner in 1963.

The evidence does not support respondent's contention that petitioner enjoyed exclusive control of the funds in issue or that disbursements from the account were made without the knowledge or approval of the Whitmans. However, petitioner refused to account to the Whitmans and failed to explain to this Court how much of these funds was paid to whom, when and for what [21] purpose. Accordingly, petitioner's uncorroborated testimony that none of the expended funds was appropriated to his own use and benefit and that all such funds were properly expended for development of the auto air conditioner is insufficient to rebut the presumptive correctness of respondent's determination. Accordingly, we hold that \$1,620 of the \$2,920 made available to petitioner to develop the air conditioner was properly taxable to petitioner in 1963.

Issue 3. Purchase of Silver

In May 1963, petitioner received \$1,000 from the Whitmans to purchase silver for the Whitmans who never received it. Mrs. Whitman's testimony convinces us that petitioner misappropriated these funds for his own benefit and was properly taxable thereon in 1963.

Issue 4. The Boat, Motor and Trailer

In 1964, petitioner received a boat, motor and trailer which the Commissioner determined were includible in his income for the year 1964 at a value of \$2,500. Petitioner did not offer the testimony of the persons who allegedly made the gifts. Petitioner's uncorroborated testimony that these items were gifts from members of his congregation is insufficient to overcome the Commissioner's determination which is [22] fully sustained in view of petitioner's failure to present any evidence of the value of the boat, motor or trailer. *Wichita Terminal Elevator Co.*, 6 T.C. 1158 (1946), *affd.* 162 F.2d 513 (10th Cir. 1947).

Issue 5. Business Expenses

For the taxable years 1963, 1964 and 1965, the Commissioner allowed petitioners business expense deductions of \$3,018.52, \$3,659.99 and \$4,931.90, respectively. Petitioners contend their business records show they were entitled to deduct business expenses of \$4,169.41, \$5,844.28 and \$6,470.11 in the years 1963, 1964 and 1965, respectively.

Petitioners' records contained duplicate checks and vouchers in the same or different categories of expenses, documents reflecting personal or capital expenditures, and were generally incomprehensible. Having failed to prove they were entitled to business expenses in each of the years in issue in excess of those allowed by the Commissioner, petitioners cannot prevail on this issue.

Issue 6. Depreciation Deductions

The Commissioner disallowed all depreciation claimed by petitioners on their returns for 1963, 1964 and 1965. Petitioners argue that the record shows they are entitled to those deductions and that the Commissioner's determination was arbitrary and erroneous. We disagree.

Petitioner's uncorroborated conclusive statement that the items shown on the returns for the years in issue are correct does not establish the right to the depreciation deductions in issue. Except for one item, petitioners failed to prove the cost of the assets in question. Moreover, without exception, petitioners failed to establish the extent of personal use, the useful life and salvage value of each of the assets involved. Accordingly, respondent's determination was not arbitrary or erroneous and must be sustained.

Issue 7. Negligence Penalty

Petitioners' system of record keeping, based on bank records only, requires all business receipts to be deposited in the bank. Yet, petitioners failed to deposit all income earned during each of the years in question. Moreover, petitioners' records are generally unintelligible, fail to support the income reported and expenses deducted, and resulted in substantial understatements of taxable income for each of the years in [24] issue. Having failed to satisfactorily explain these shortcomings, petitioners are subject to the negligence penalty imposed by section 6653(a) for the taxable years 1963, 1964 and 1965. See *Marcello v.*

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Commissioner, 380 F.2d 499 (5th Cir. 1967), affg. a Memorandum Opinion of this Court, cert. denied 389 U.S. 1044 (1968).

Decision will be entered under Rule 155.

DECISION

UNITED STATES TAX COURT

OREN F. POTITO,

Petitioner,

versus Docket No. 5304-68

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Pursuant to the opinion of the Court filed on June 16, 1975, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income taxes due from the petitioner for the taxable years 1963 and 1964 in the amounts of \$1,805.18 and \$2,170.19, respectively; and

That there are additions to the tax due from the petitioner for the taxable years 1963 and 1964, under the provisions of *Int. Rev. Code of 1954*, § 6653(a), in the amounts of \$90.26 and \$108.51, respectively.

/s/ WILLIAM A. GOFFE
Judge

Entered: Aug. 26, 1975

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It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

MEADE WHITAKER
Chief Counsel
Internal Revenue Service

/s/ VERNON J. OWENS
VERNON J. OWENS
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August 18, 1975

/s/ WILLIAM R. FRAZIER
WILLIAM R. FRAZIER
Counsel for Petitioner
816 Atlantic National Bank Bldg.
Jacksonville, Florida 32202
Tel. No. 904-353-5616

July 3, 1975

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DECISION

UNITED STATES TAX COURT

OREN F. POTITO and HELEN M. POTITO,
Petitioners,

versus Docket No. 5305-68

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Pursuant to the opinion of the Court filed on June 16, 1975, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioners for the taxable year 1965 in the amount of \$574.03; and

That there is an addition to the tax due from the petitioners for the taxable year 1965, under the provisions of *Int. Rev. Code of 1954*, § 6653(a), in the amount of \$28.70.

/s/ WILLIAM A. GOFFE
Judge

Entered: Aug. 26, 1975

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of

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either party to contest the correctness of the decision entered herein.

MEADE WHITAKER
Chief Counsel
Internal Revenue Service

/s/ VERNON J. OWENS
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August 18, 1975

/s/ WILLIAM R. FRAZIER
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August 14, 1975

Oren F. POTITO, Oren F. Potito and Helen M. Potito,
Plaintiffs-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Defendant-Appellee.

No. 76-1008
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

June 23, 1976.

Appeals from the Decisions of the United States Tax
Court (Florida Case).

Before COLEMAN, GOLDBERG and GEE, Circuit
Judges.

PER CURIAM:

Taxpayers Oren and Helen Potito appeal the decision of the United States Tax Court determining deficiencies in their federal income taxes for 1963, 1964 and 1965.¹ A 5% negligence penalty was imposed. With possible minor exceptions, the issues are purely factual. An appraisal of the record leaves us convinced that petitioners failed, utterly, to carry their burden of rebutting the presumptive correctness of the Commissioner's assessment. Therefore, the lower court's

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

¹ The case involves Oren Potito's individual return for 1963 and 1964, and his 1965 joint return with his wife Helen.

resolution of the facts and its legal conclusions are not clearly erroneous.

Petitioner's 1963, 1964 and 1965 income tax returns listed Continental Engineering, his solely owned appliance and air conditioner repair service, as the only source of his income. The gross receipts of the business were listed as \$7,320, \$8,730, and \$7,300 for the years in question, respectively. After claiming extensive business deductions and depreciation, petitioner showed a net profit of \$328.74 for 1963, \$817.90 for 1964, and a net loss of \$297.66 for 1965. No federal income taxes were paid for these three years. Thus, adding depreciation and net profit, Potito was left with a disposable income of \$1,453.40 in 1963, \$2,523.39 in 1964, and \$1,452 in 1965.

The Commissioner determined that there were several income items not reported on the returns, that business deductions were grossly overstated, and that petitioner was entitled to no depreciation. IRS found that Potito, as minister of the Church of Jesus Christ-Christian, exercised exclusive dominion and control over the organization's funds while receiving no salary specified as such. The Church's income was therefore taxable to him personally after allowing for necessary expenses. Petitioner maintained below that his church in St. Petersburg, was affiliated with an organization by the same name established in California that enjoyed a tax-exempt status. Therefore, the monies he collected were not taxable to him, or alternatively if he was chargeable with the Church's income, he had already included it in his reported income. In his brief on appeal, Potito abandons any

claim of exemption. He relies solely on the claim that the receipts have already been reported.

The taxpayer was also charged with the income produced by *The National Christian News*, a newspaper which he edited and distributed as an adjunct to his church activities.

In 1963 a Mr. and Mrs. Whitman agreed to back Potito in developing a new type automobile cooler which would supposedly revolutionize automobile air conditioning. To this end \$2,920 was placed at petitioner's disposal in a bank account in Pinellas Park, Florida. Potito was to organize a corporation by the name of National Engineering to develop, manufacture, and market the invention. Although the corporation was never organized, substantial funds were expended from the account. When Potito refused to justify or explain the expenditures, the Whitmans decided to close the account in either 1964 or 1965 and withdrew the \$1300 balance which remained. The Commissioner charged the taxpayer with the entire \$2,920 as income. The Tax Court modified this determination to charge Potito only with the \$1,620 which he expended and failed adequately to account for. Also in 1963, petitioner received \$1,000 from the Whitmans to purchase silver dollars for them. Mrs. Whitman testified that she and her husband never received the silver. Accordingly Potito was charged with this \$1,000 as income in 1963.

In 1964 petitioner received a new 19-foot Seabreeze boat, 80 horsepower motor, and trailer from Mr. and Mrs. Ernest Stevens, two of his parishioners. IRS found these items constituted payment to Potito for his

services as their minister, and were not a gift; thereby adding \$2500 to his income in 1964.

In regard to business expenses the Commissioner determined that the taxpayer's records substantiated allowable items in the amounts of \$3,018.52, \$3,659.99, and \$4,931.90 for the three years in question. The balance of the business deductions claimed on the returns was disallowed. Potito's only records of his business activities consisted of cancelled checks and receipts which the Tax Court found "generally incomprehensible". As for depreciation deductions for an automobile, a truck, three tape recorders, shop tools, office furniture, and equipment, the taxpayer failed to demonstrate the requisite basis of the assets, their useful life, salvage value, and extent of personal use. All depreciation was denied.

Potito challenges all these findings of the Commissioner which were sustained at trial, claiming that he is being persecuted by the Government and Tax Court Judge because of his religious beliefs. In our opinion, the record simply fails to support this assertion. In one sentence in his opinion, the Judge describes the nature of petitioner's religion, but only by way of explanation, not of any other significance. The transcript reveals that the petitioner had a fair and impartial hearing.

The Commissioner's determination of a tax deficiency bears the presumption of correctness and the burden of disproving the deficiency rests with the taxpayer. *Welch v. Helvering*, 290 U.S. 111, 115, 54 S.Ct. 8, 9, 78 L.Ed. 212, 215 (1933); *Helvering v. Taylor*, 293 U.S. 507, 515, 55 S.Ct. 287, 290, 79 L.Ed. 623, 629 (1935);

Armes v. Commissioner of Internal Revenue, 5 Cir. 1971, 448 F.2d 972, 973. Potito's evidence consisted of his own self-serving testimony and a morass of checks and receipts. The Tax Court found his testimony to be in conflict with that of other witnesses as well as being inherently unreasonable or improbable. Such testimony is certainly not controlling *per se* nor is a court required to accept it. *Stein v. Commissioner of Internal Revenue*, 5 Cir. 1963, 322 F.2d 78, 82. On the basis of the taxpayer's inadequate evidence as applied to each of the issues individually considered below we cannot say that the Tax Court's resolution was clearly erroneous. *Armes v. Commissioner of Internal Revenue*, *supra* at 974; *Stein v. Commissioner of Internal Revenue*, *supra*.

The Tax Court found that the church income, at least in the amounts actually deposited in the church's bank account, had not been reported on Potito's tax return. The finding is supported by the tax returns themselves which indicate gross receipts only from Continental Engineering. Potito's return preparer stated that petitioner never informed her of any other income source. Since Potito signed his tax return and verified that it was true and correct as to every material matter, the Court could discount his testimony as to the income actually reported. Further, a cursory review of the taxpayer's actual expenditures for personal living expenses indicates that they exceeded the amount of disposable income reported to the Revenue Service, that is, taxpayer's records indicate that he spent more than his reported receipts.

The law is settled that funds diverted to one's own use constitute taxable income. *United States v. Rochelle*, 5 Cir. 1967, 384 F.2d 748, *cert. denied*, 390 U.S. 946, 88 S.Ct. 1032, 19 L.Ed.2d 1135 (1968); *Akers v. Scofield*, 5 Cir. 1948, 167 F.2d 718, *cert. denied*, 335 U.S. 823, 69 S.Ct. 47, 93 L.Ed. 378 (1948). No records were introduced to show how the funds for National Engineering were spent and Mrs. Whitman testified that taxpayer refused to account for them. Regardless of whether Mr. Whitman did or did not have to countersign the checks written on the account, petitioner still failed to substantiate the business nature of the expenditures. That the Whitmans still controlled the funds is also inconsistent with taxpayer's statement that he was responsible for paying the rent on the business's location. Mrs. Whitman's testimony was not a model of clarity, but she was quite specific regarding petitioner's failure to account for his expenditure of National Engineering's money and his failure to deliver the silver for which she and her husband had given him \$1,000.

In regard to the boat, the Supreme Court has clearly articulated the standard by which to judge whether an item is a gift or income. In *Commissioner of Internal Revenue v. LoBue*, 351 U.S. 243, 248, 76 S.Ct. 800, 803, 100 L.Ed. 1142, 1148 (1956), the Court determined that the taxpayer must show that a transfer of property is out of "detached and disinterested generosity" in order to be classified as a gift. The Commissioner determined that Potito received the \$2500 item in return for services he rendered as minister of the church. Here the critical test was the parishioner's intention. *Bogardus v. Commissioner of Internal Revenue*, 302 U.S. 34, 43, 58 S.Ct. 61, 82 L.Ed. 32 (1937).

Other than his own contentions, petitioner introduced absolutely no evidence of that intention. Therefore, we do not appraise the Tax Court's legal determination that this property constituted income in the same manner as the church's cash receipts as being wrong.²

Among his complaints petitioner alleges that the Tax Court erroneously found that all expenses listed on his return were attributable to Continental Engineering and that he mailed his newspaper at bulk rate rather than first class. As to the first, it is irrelevant to which enterprise the expenses were attributable as long as the taxpayer was allowed those expenses which he was able to substantiate. As to the latter, whether petitioner paid a higher or lower postal rate and is entitled to a greater or smaller deduction is dependent upon what his records verify. In the words of the trial judge, the records "contain duplicate checks or vouchers in the same or different categories of expenses, documents reflecting personal or capital expenditures and were generally incomprehensible". Potito claims that at least a partial reason for the poor quality of his documentation is that some of his records were lost in a break-in in June of 1964. In the first place, the break-in was not documented; second, he states that he was able to retrieve at least 70-80% of his records; third, the break-in in 1964 fails to explain the dearth of evidence for 1965. Petitioner bears the

² As an appellate court, our power of review over the lower court's ultimate determination as to whether or not the item constituted income is plenary and not limited by the clearly erroneous rule. As indicated above we find the Tax Court's legal conclusion correct. See *Biedenharn Realty Company v. United States*, 5 Cir. 1976, 526 F.2d 409, 416 n. 25 (en banc); *United States v. Winthrop*, 5 Cir. 1969, 417 F.2d 905, 910; *Thomas v. Commissioner of Internal Revenue*, 5 Cir. 1958, 254 F.2d 233, 236.

responsibility for his inadequate or non-existent bookkeeping system, not the Tax Court.

Taxpayer made absolutely no attempt to provide the background evidence necessary to sustain his claimed depreciation deductions. He established his cost basis in one item only, and failed to show the useful life, salvage value, and extent of personal use of any of the alleged depreciable items.

The Internal Revenue Code of 1954 provides,

If any part of any underpayment . . . of any tax . . . is due to negligence or intentional disregard of rules or regulations . . . there shall be added to the tax an amount equal to 5 percent of the underpayment. 26 U.S.C.A. § 6653(a).

The negligence penalty was assessed for each of the three years involved. Potito bore the burden of proving that imposition of the penalty was improper. Since "failure to keep books and documents necessary to form a rational basis for the income reported and the expenses deducted" is a ground for application of the penalty, the taxpayer's objection here must fail. *Marcello v. Commissioner of Internal Revenue*, 5 Cir. 1967, 380 F.2d 499, 507.

The judgment of the Tax Court is

AFFIRMED.